STATE OF CONNECTICUT
SUPREME COURT

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S.C. 18089, 18091

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TOWN OF BRANFORD

VS.

THOMAS SANTA BARBARA, ET AL.
(S.C. 18089)

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NEW ENGLAND ESTATES, LLC

VS.

TOWN OF BRANFORD, ET AL.
(S.C. 18091)

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# REPLY BRIEF OF APPELLANT, TOWN OF BRANFORD

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TO BE ARGUED BY:

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## REPLY STATEMENT OF FACTS AND PROCEEDINGS

### A. Section 8-30g Evidence

This Court should be wary of the factual assertions made in NEE's brief. For instance, the citation in support of NEE's claims concerning the extent and description of wetlands (NEE Br. at 4) consists merely of statements of NEE's counsel before the PZC. (PZC Tr. 9/4/03 at 18-20; Reply App. at RA28-RA30). NEE's counsel made similar claims that plans were identical for the various proposals for purposes of the IWC and the Army Corps of Engineers. (NEE Br. at 8 (PZC Tr. 9/4/03 at 84-85; Reply App. at RA34-RA35)). Self-serving representations of counsel are not evidence. *Cologne v. Westfarms Assocs.*, 197 Conn. 141, 154 (1985).

NEE presents factual claims that have important omissions. For example, the property is served by water and sewer (NEE Br. at 4) because of groundwater contamination from the landfill, as explained by Kurt Schwanfelder, who was on the Branford legislative body at the time the service was installed. (PZC Tr. 11/6/03 at 74-75; Reply App. at RA160-RA161). Likewise, NEE's citation to the zoning regulations for the proposition that residential use is permitted in IG-2 (NEE Br. at 5) omits the operative proviso: "If dwellings are prohibited in the District such use may be located only in a lawfully existing dwelling unit." Branford Zoning Regs. § 24, Sched. A-7.d & A-8.d. (Town's App. at A23). Similarly, NEE's assertion that the Town sought a "generic" letter from Fuss & O'Neill regarding changing the parcel to residential (NEE Br. at 7) fails to note that the resulting memorandum observes: "Changing the zone of the 77-acre parcel to the north of the landfill could potentially place future residents closer to the landfill than anyone has lived in the past." (PZC Ex. 33, Tab 5; NEE App. at A-69).

NEE also presents factual claims as if they were established facts. For example, NEE insists that it had an inlands wetlands permit (see NEE Br. at 9 (describing as "inaccurate" the IWC letter explaining the lack of permit); 13 (claiming it had "environmental permits")), even though the IWC held to the contrary and NEE had withdrawn its IWC appeal.

The Owners claim that the aerial photos "show profuse vegetation." (*Owners' Br. at* 4). However, as the PZC's environmental consultant noted, much of the vegetation on the site consists of invasive species. (PZC Ex. 34; Town's App. at A177). This is fully consistent with property that was denuded of much of its topsoil.

**B. Articulation**

Concerning the opposition claim that articulation was necessary on the § 8-30g issue, the Owners' brief misstates the record. They assert: "What is notably absent from the memorandum of decision, however, is any mention of General Statutes § 8-30g." (Owners' Br. at 7). This is not correct. See R. 67 and 68, where the court discusses NEE's § 8-30g application and mentions § 8-30g three times. See also R. 65 and 84-85, where the court discusses the current industrial zoning and the probability that the land could be used for a residential purpose within a reasonable time. The Owners then backtrack and assert: "Yet, Judge Cremins does not discuss this issue [§ 8-30g] *expressly* in the memorandum of decision." (Owners' Br. at 7) (emphasis added).

In fact, the trial court implicitly and necessarily decided it was reasonably probable that NEE would have prevailed on its § 8-30g appeal if the Town had not condemned the property. The § 1983 trial, also presided over by Judge Cremins, immediately followed the entry of judgment for just compensation. In ruling that the Town could not litigate the § 8-30g issue in the § 1983 trial, the court stated:

> First of all, I want to give the ruling regarding the – what do we call this, the determination of the final permits with respect to the 354 unit development.
>
> . . . .
>
> For the record, I have received memoranda from all parties with regard to the permits and other issues with respect to the 8-30(g) application.
>
> . . . .
>
> One of the issue determinations that was made by this Court in a prior proceeding was that the highest and best use for the 77-acre parcel was for residential development. Therefore, based on the issue decided by this Court in a prior valuation proceeding that the highest and best use of the subject property was for residential development, the Court finds that it was reasonably probable that the 77-acre parcel, but for the taking, could have been developed to the proposed residential use, that is the 354 unit affordable housing plan proposed by New England Estates.
>
> The Court further finds, based on the prior valuation proceeding and the find-

> ings therein, that it *was reasonably probable that the necessary administrative approvals for the 354 unit project would have been obtained.*

(Tr. 8/21/07, a.m. at 12 (emphasis added); S.C. 18132, Town's App. at A68-A69; see also NEE Br. at 17 n.12 (quoting jury charge in S.C. 18132)).

There are only two possible ways the "necessary administrative approvals" for the § 8-30g proposal would have been obtained, and one of them, that the Town's administrative agencies would have voluntarily issued the necessary approvals, is only theoretical. The Town raised that theoretical possibility (Town's Br. at 31-32) only to show there was no evidence to support it. NEE and the Owners evidently agree, for their briefs do not claim the court could have ruled in their favor on that basis.[1] That leaves only one possible basis for the decision: the Town would have been required to grant the necessary administrative approvals because a court would have ruled against the Town on a § 8-30g appeal. NEE and the Owners do not dispute that proposition.

Unlike the Owners, NEE does not try to obscure the obvious – that the trial court did decide the § 8-30g claim against the Town. Indeed, NEE expressly conceded that this was so in its July 9, 2008 opposition to the Town's motion to strike NEE's appellate brief:

> The trial court's decision in the valuation appeal included two subsidiary findings – one express, one implied – that are of substantial value to NEE. The express finding was that the highest and best use of the taken property was for residential purposes. *The implied finding was that it was reasonably likely that NEE would have prevailed in its § 8-30g appeal.* These findings, as discussed above, were incorporated into the jury instructions in the § 1983 case.

(NEE Stmt. in Opp. 7/9/08 at 8-9; see also *id.* at 3) (emphasis added).

**C. Branse Testimony**

The opposition ignores the precise ruling the Town is challenging (Town's Br. at 35):

> Q. [by the Owners' counsel] So, well, let me break it down. What was the – have

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[1]/ The Owners note in bullet form that the parcel is served by public water and sewer, that it is partially bounded by residential development, that in 1988 the PZC approved a residential development for the parcel, that Branford's Plan of Development in 1997 designated the parcel for residential development, and that the Owners' representative testified that it was suitable for residential development. (Owners' Br. at 13-14). Nowhere among these and other bullets is one even hinting that it was reasonably probable that the PZC in 2003 or 2004 would have *voluntarily* granted an application for residential use of the parcel.

you formed an opinion with respect to the validity of the reasons given by the Branford Planning and Zoning Commission?

. . .

A. . . . Yes.

Q. And what is your opinion with respect to –

Mr. Reif: Object. That's not a proper basis. An interpretation of law is not an appropriate basis for expert testimony. . . .

THE COURT: The objection is overruled. I think it goes to the weight rather than admissibility of the testimony. So the objection is overruled.

. . .

A. *My opinion is that these reasons would not have been found sufficient by a Superior Court judge* under the tests that applied in 8-30g application. I hesitate when you said the word "validity", Mr. Smith. The question is sufficiency.

(Town's App. at A90, A91, A92) (emphasis added). Branse opined on a pure issue of law: how a judge would have ruled on a § 8-30g appeal.

## REPLY ARGUMENT

I. PROCEDURAL RED HERRINGS

### A. The Town Did Not Need to File a Motion for Articulation

The trial court clearly decided the § 8-30g issue, as NEE concedes and the Reply Statement of Facts shows. Because trial and appellate review are identical and the relevant documents are part of the record on appeal, a motion for articulation is unnecessary. *Miller's Pond Co. v. New London*, 273 Conn. 786, 815 n.27 (2005); *Niehaus v. Cowles Business Media, Inc.*, 263 Conn. 178, 185 (2003).[2]

The Owners' argument on the need for articulation is entirely based on a misstatement of the record – that the court did not decide the § 8-30g issue. NEE, on the other hand, concedes that the trial court implicitly found it was reasonably probable that NEE would have prevailed on a § 8-30g appeal. It argues that the Town nevertheless should have asked the trial court to elaborate on why it made this determination because the Town has certain burdens of proof under § 8-30g. Like one of the litigants in *Quarry Knoll II Corp. v. Planning & Zoning Comm'n*, 256 Conn. 674, 721 (2001), NEE has confused burden of

[2]/ *Bingham v. Department of Public Works*, 286 Conn. 698, 704 n.5 (2008), and *Schoonmaker v. Lawrence Brunoli, Inc.*, 265 Conn. 210, 232-33 (2003), are not on point because it is unclear there whether the trial court considered the issue raised on appeal *at all.*

proof with scope of review. Whatever burden of proof the Town has in a § 8-30g appeal does not change as the case proceeds up the appellate ladder.

> Because the plaintiffs' appeal to the trial court is based solely on the record, the scope of the trial court's review of the commission's decision and the scope of our review of that decision are the same.

*River Bend Assocs., Inc. v. Zoning Comm'n,* 271 Conn. 1, 26-27 n.15 (2004) (quoting *Quarry Knoll,* 256 Conn. at 726 n.29). Burden of proof thus has nothing to do with this Court's scope of review.

NEE's confusion on these two concepts causes it to miss the key point: "the precise legal analysis undertaken by the trial court is not essential to the reviewing court's understanding of the issue on appeal." *Community Action for Greater Middlesex County, Inc. v. American Alliance Ins. Co.,* 254 Conn. 387, 396 (2000). NEE attempts to distinguish *Community Action* on the ground that that case involved a pure issue of law where the facts were undisputed. That is no distinction because this Court in both cases looks at the same documentary evidence that the trial court looks at and gives no deference to the trial court's decision. In *Community Action*, the trial court decided a motion for summary judgment. This Court then gave the same review to the evidence presented on the motion that the trial court did. Likewise here, as *River Bend* holds, this Court's scope of review in a § 8-30g appeal is identical to the trial court's.

The trial court might point this Court in a direction, but in the end, whatever the trial court might have said about the record, this Court would have to make its own independent judgment anyway. A motion for articulation is not necessary.

**B. Attorney Doyle's Statement Is Irrelevant to These Appeals**

NEE quotes a colloquy between Judge Cremins and the Town's former counsel, David Doyle, concerning the issue of contamination. (NEE Br. at 11). NEE admits (NEE Br. at 10) that the colloquy with Doyle concerns a possible environmental offset to market value the Town might be claiming *at trial.* This colloquy is irrelevant to any § 8-30g review of the *PZC's findings* on environmental contamination.

## II. THE COURT'S CONCLUSION THAT THE HIGHEST AND BEST USE OF THE LAND WAS FOR RESIDENTIAL DEVELOPMENT WAS IMPROPER.

### A. Scope of Review

Because the trial court's finding of residential use necessarily turns on the propriety of the PZC's conclusion to the contrary – and therefore the application of § 8-30g(g) – this Court's scope of review is de novo.[3] In a § 8-30g appeal, the trial court reviews factual findings for sufficient evidence in the administrative record and applies plenary review to the reasons the PZC gives for its decision. *Carr v. Planning & Zoning Comm'n*, 256 Conn. 573, 596-97 (2005). Given that the scope of review is identical for both courts, *Id.; River Bend*, supra; this Court's review of the trial court's findings and conclusions is plenary.

That NEE withdrew its § 8-30g appeal in favor of a collateral attack on the PZC's decision does not alter the scope of review of the same substantive claims.

### B. Section 8-30g

The main issue on this appeal is on whether the record contains sufficient evidence to support a conclusion that NEE would have prevailed in a § 8-30g appeal, thereby enabling the land to be used for residential development.

The following will expose numerous defects in NEE's brief and show that it is not reasonably probable NEE would have won such an appeal. These defects include: (1) NEE's flawed discussion of deed-restricted housing; (2) NEE's flawed discussion of the Industrial Zone exemption; (3) the need for a zoning change; (4) the deference due the PZC's factual findings concerning environmental contamination; (5) the significance of necessary and critical information the PZC asked for but NEE did not supply; (6) the deference due the PZC's factual findings concerning site restrictions; (7) the significance of the lack of a wetlands permit; and (8) the significance of the Coastal Management Act.

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[3]/ The Town does not dispute that it would have had the burden of proof in a § 8-30g appeal. Nevertheless, NEE and the owners had the burden of proof in the valuation proceeding to prove that it was reasonably probable that NEE would have won a § 8-30g appeal in order to establish their claim that the highest and best use of the property was for residential development. See *Lynch v. West Hartford*, 167 Conn. 67, 74 (1974) (property owner must show likelihood of zone change to establish enhanced value of taken property).

1. *Deed-Restricted Housing*

NEE claims that "[o]nly housing meeting the statutory definition may be considered in determining a municipality's need for affordable housing." (NEE Br. at 24). NEE fails to cite the controlling statute on this claim, even though the PZC relied on the statute in its decision. (PZC Dec. at 19; Town's App. at A134).

Section 8-30g does not define "affordable housing," but § 8-39a does:

> As used in this *title*, "affordable housing" means housing for which persons and families pay thirty per cent or less of their annual income, where such income is less than or equal to the area median income for the municipality in which such housing is located, as determined by the United States Department of Housing and Urban Development.

(emphasis added). By its plain language, this definition applies to all of Title 8 and therefore § 8-30g. Notably absent from this definition is any mention of deed-restricted property. The legislature knew how to include deed restrictions in § 8-30g, as it did so in § 8-30g(k), concerning exemptions from the appeal process entirely. The lack of any such reference in § 8-30g(g) makes it clear that the legislature did not intend the crabbed definition of affordable housing that NEE urges.[4]

2. *Industrial Zone Exemption*

NEE claims that because dwellings in IG-2 may contain professional offices and that rooming houses are allowed in that district, residential use is permitted. In addition to ignoring the express prohibition on new residential use set forth in Branford Zoning Regulations § 23.12, NEE fails to note that both uses are subject to a proviso: "If dwellings are prohibited in the District such use may be located only in a lawfully existing dwelling unit."

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[4]/ *West Hartford Interfaith Coalition, Inc. v. Town Council*, 228 Conn. 498, 519-22 (1994), does not help NEE in light of the plain language of § 8-39a. The issue in *West Hartford Interfaith Coalition* was the exemption of § 8-30g(k), not the definition of affordable housing generally. Here, the Town makes no claim that it is exempt from the appeal procedure set forth in § 8-30g. The Town simply claims that sufficient evidence exists in the record to support the PZC's finding that the real-world need for affordable housing, as statutorily defined, is not great when compared to the substantial public interests at stake.

(Town's App. A23). Thus, new dwellings are clearly not permitted *in* IG-2.[5]

In effect, NEE claims that pre-existing or non-conforming residential uses preclude the Town from ever limiting the district to industrial use for purposes of § 8-30g. Yet NEE points to nothing in the statutory text or legislative history to support such a proposition. As a practical matter, in New England industrial zones often exist with some non-conforming or pre-existing residences in them. With the industrial zone exemption, the legislature intended, as shown below, to ensure that developers would not try to shoehorn new affordable housing into inappropriate industrial zones. That preexisting nonconforming uses exist in some of the state's older municipalities, where many structures predate the current zoning ordinances, or even predate zoning altogether, does not change the fact that the legislature elected a policy against placing additional new housing in these areas.

To the extent that the plain language is ambiguous; see Conn. Gen. Stat. § 1-2z; the legislative history makes clear that the legislature sought to preserve industrial zones. In offering a successful amendment to P.A. 95-280, which modified § 8-30g, Rep. Fritz explained that the amendment would "guarantee or make sure that industrial land or industrial zone which is a very high priority in terms of a tax base would not be turned into residential." 38 H.R. Proc., Pt. 16, at 5728 (1995 Sess.) (Reply App. at RA198). In support of the amendment, Rep. Nardello stated: "I think it's very important that when a town plans, has a long standing plan of development which includes industrial use, that, that industrial land be allowed to stay as such and they not be forced to change it to a residential zone." *Id.* at 5735 (Reply App. at RA205).

NEE next claims that because various uses such as schools, hospitals, and charitable institutions are permitted by special exception in IG-2, residential use is necessarily permitted. The Branford Zoning Regulations classify such uses separately from residential

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[5]/ NEE contends that the regulations concerning the industrial zone exemption are those in effect at the time of the application. The record is clear that this has never been in dispute. (PZC Dec. at 23 n.22; Town's App. at A138; Town's Br. at 11). It also bears noting that the proviso makes NEE's claim purely theoretical because the record does not show that there has *ever* been a dwelling unit on the property.

uses. Compare § 24, Pt. A (residential), with § 24, Pt. B (community facilities and services). Any residential component of such facilities would be an accessory use. "[An] accessory use [is] a use which is customary in the case of a permitted use and incidental to it." *Loring v. Planning & Zoning Comm'n*, 287 Conn. 746, 753 (2008) (quoting *Lawrence* v. *Zoning Board of Appeals*, 158 Conn. 509, 511-13 (1969)). "The main, principal and dominant use of a building determines its character." *Fox v. Zoning Board of Appeals*, 146 Conn. 70, 75 (1958); see also *Beit Havurah v. Zoning Board of Appeals*, 177 Conn. 440, 447 (1979). The dominant use of schools, hospitals, and charitable institutions is service, not residential. That some residential use may occur as an accessory use does not transform such uses into residential districts. In any event, there is no evidence that the Town has made or would make any such exceptions for this particular zone. NEE's assertion amounts to pure speculation and does not support its claim as to residential use.

Last, NEE claims that the SDA/PDD permitted residential use. A Special Development Area merely provides the opportunity to apply for a Planned Development District. Approval of the plan is required prior to the modification of the zoning regulations and zoning map. Branford Zoning Regs. § 35.6 (Town's App. at A48-A49). Further, the trial court found that the PDD was eliminated in January 2002. (R. 65). Shirley Rasmussen explained at the PZC hearing that the PDD elimination was at NEE's request. (PZC Tr. 10/2/03 at 52; Reply App. at RA 82). Following that PDD elimination, the PZC in 2002 and 2003 denied NEE's applications to build residential property on the site. The SDA in no way establishes that residential use was permitted on the property.

When, as here, the Town denies the application on the basis of the industrial use exemption, the only thing the Town needs to prove under the first sentence of § 8-30g(g) is that there is sufficient evidence to show that the exemption applies. *JPI Partners, LLC v. Planning & Zoning Bd.*, 259 Conn. 675 (2002). NEE and the owners do not claim otherwise. As the plaintiffs in *JPI* conceded on appeal, that exemption "contravened the usual presumption in favor of affordable housing land use applications . . . ." *Id.* at 682. Since

the industrial use exemption applies, that is the end of the road for NEE and the Owners.

3. *Zone Change*

NEE claims that a zone change was not necessary. However, NEE's application sought "revisions to the Zoning Regulations of the Town of Branford, which revisions, if enacted, would have the effect of creating a new zone, a "Housing Opportunity District." (PZC Dec. at 2; Town's App. at A117). Indeed, the cover sheet to NEE's June 26, 2003 application expressly seeks "REZONING OF 76.91 ACRES AT PINE ORCHARD ROAD AND TABOR DRIVE TO HOD." (PZC Ex. 79; NEE App. at A-71). The application included "proposed amendments to the Branford Zoning Regulations include[ing] a new Housing Opportunity District as Section 39." (PZC Ex. 79; NEE App. at A-80). It further stated:

> This new district is substantially similar to the Affordable Housing District ("AHD") in the existing Section 38 and draws upon language in the existing Planned Development District (Section 35) and Multifamily Residential District (Section 33.) Existing regulations have been tailored to fit the development program proposed here. In addition, it contains provisions that meet the current statutory requirements for affordable housing.
>
> The amendment has been drafted to apply exclusively to The Fairways Village Estates development. The Commission may, in its discretion, expand this language after adoption to facilitate future affordable housing developments.

(*Id.*) NEE's proposed § 39.2.1a. stated: "The gross area of a parcel or combined parcels *to be rezoned* and developed as a Housing Opportunity District shall not be less than 70 nor more than 80 acres under one ownership." (PZC Ex. 79, Tab 4, App. E. (emphasis added); Reply App. at RA181). The application plainly shows the need for a zone change.

NEE seeks to avoid this fatal concession by claiming that the only issue was the denial of the site plan and that the HOD regulation was merely "a matter of preference and practice." (NEE Br. at 26). Claiming that it only sought approval of its site plan would not alter NEE's need for the PZC to amend its land use laws to enact a zone change to accommodate NEE's application.

Similarly, NEE claims that the Town did not argue the need for a zone change in the trial court but instead focused on the denial of the site plan. (NEE Br. at 26). But as NEE's

site plan called for a zone change, the zone change rose or fell with the application. Here, it fell. There was no need to argue separately below that a zone change was necessary.

Ignoring its concession (via its application for a zone change) that a zone change *was* necessary, NEE lastly reverts to the earlier applications when the property was subject to a Planned Development District. (NEE Br. at 26). First, as to the 2002 application, NEE again ignores that the PZC eliminated the PDD prior to the application at NEE's request. (R. 65) NEE further ignores that a successful application modifies the zoning regulations. Branford Zoning Regs. § 35.6 (App. at A48-A49). Moreover, that the PZC approved a project in 1988 subject to conditions does not mean that the PZC is required to ignore new information or developments 15 years later on a new application.[6] Thus, to prove that the land was fit for residential use, NEE and the owners needed to show that they would have prevailed on a § 8-30g appeal or obtained a zone change through conventional means. NEE and the owners failed to rebut the PZC's justification for denying the application.

4. *Environmental Contamination*[7]

Although NEE insists that the Town carry its burden of defending its decision under § 8-30g, NEE refuses to acknowledge that under § 8-30g, the PZC is the fact-finder and this Court must defer to the PZC's factual findings if sufficient evidence exists in the record to support them. *River Bend,* 271 Conn. at 24; *Christian Activities Council, Congregational v. Town Council*, 249 Conn. 566, 581 (1999) ("the zoning commission remains the fact finder [in a § 8-30g case], as in a traditional zoning case"). Fact finders traditionally resolve conflicting evidence and make determinations of credibility, *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Comm'n*, 285 Conn. 381, 427 (2008), and nothing in § 8-30g or this Court's jurisprudence suggests otherwise.

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[6]/ Even in 1988, the PZC had environmental concerns, as one of the conditions for approval was that the developer "[s]ubmit environmental analysis of measures to be taken to protect ponds from possible area leach[a]tes." (NEE App. at A-11).

[7]/ NEE first claims that the Town conceded the lack of contamination on the site. (NEE Br. at 27). That point is addressed above. See Part I.B., *supra*.

NEE also refuses to acknowledge that, although the Town must show *"more than a* mere theoretical possibility" of a specific harm, it does not need to show that the harm is likely. *Carr*, 273 Conn. at 596. NEE argues in essence that its evidence is stronger and that the Court should accept its views rather than the facts the PZC found even though the Town does not have to show the harm is likely. For instance, that the Town's expert reported to DEP that landfill had not yet contaminated neighboring properties (NEE Br. at 28, point 2) does not mean that no risk of future contamination exists, especially in light of the VOCs present in the well nearest the subject property. (Town's Br. at 14). Similarly, the PZC could decide what effect, if any, the cross examination of Hurley by NEE's counsel (NEE Br. at 28, point 4) had on his credibility. The PZC also was not required to credit NEE's expert reports on the condition of the property. (NEE Br. at 28, point 3).

Further, NEE is fixated on its claim that the levels of VOCs do not exceed state standards, as if that settles the question once and for all as to whether the property may be contaminated in the future.[8] (NEE Br. at 28-29, points 3, 5). NEE similarly insists that because the DEP, as yet, has not taken action on the landfill, the land is environmentally sound. (NEE Br. at 5, 12, 28). NEE provides no authority for the proposition that a level below the state recommendations for remediation means the property is uncontaminated or is not at risk of contamination as a matter of law. At most, those readings and the reports showing the Town in compliance indicate that the Town is properly maintaining the landfill and that the Town does not need to remediate the site. Moreover, Hurley explained in the cross examination upon which NEE relies that it is

> not an appropriate use for the RSRs to look at, other than to say the concentration of volatiles is below the RSRs. It doesn't mean it won't be in the future. It doesn't mean it won't be a year from now. And again, we're only looking at those limited compounds. There's a number of other compounds that could be in the leachate.

(PZC Tr. 11/6/03 at 43; NEE App. at A-199).

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[8]/ This is NEE's attempt to reconcile the conflicting statements of its own experts as to whether leachate affects the property. One expert says no. (Town's Br. at 16). The other expert says yes, but claims the levels are within state limits. The Town is not required to take comfort in these purported assurances.

Next, NEE claims – incredibly – that Hall, Schwanfelder, *and Monopoli did not* provide testimony that the on-site condition was incompatible with residential use. (NEE Br. at 29, point 6). Hall discussed in detail the materials in the landfill as well as the leaching process. Monopoli testified about the dangers of VOCs. Schwandfelder offered testimony as to the site's previous uses and the scrapping of heavy equipment on the site. (Town's Br. at 14-15). The PZC could reasonably determine from this testimony that environmental hazards on the site precluded residential use.

NEE also claims that the golf course, which appeared and disappeared with NEE's various proposals, provided an adequate buffer zone (NEE Br. at 29, point 7). The PZC was not required to agree.

All of this evidence before the PZC was sufficient for it to find that environmental contamination was more than a theoretical possibility. Whether such a harm was likely is legally immaterial.

Attempting to divert attention from the burden of proof as stated in *Carr*, NEE lastly makes the astounding claim that the Town failed to attack the trial court's finding of no contamination on the property. (NEE Br. at 29, point 8). That finding has nothing to do with whether NEE would have won an appeal from the § 8-30g decision of the PZC. The Town spent a substantial portion of its brief explaining the environmental problems on the site as found by the PZC on the record before it. NEE could not prevail on a § 8-30g appeal, and therefore establish the reasonable probability of residential use, without overcoming the environmental issues. NEE's argument is a procedural red herring.

Because the record before the PZC is sufficient to show more than a theoretical possibility of environmental contamination, a § 8-30g appeal by NEE would have failed.

5. *Missing Information*

The PZC was entitled to request information from NEE to exercise its regulatory duties properly. NEE's response was to stonewall the PZC with various excuses.

Notwithstanding the various proposals since 1988, NEE claims that "[t]he residential

site plan for this property has not changed since 1988 and has been fully-engineered since 1988." (NEE Br. at 29). The project has varied in the number of units from 268 to 354 and has included or excluded a golf course, depending on the application. Because the project has been a moving target, the PZC could reasonably expect answers to its concerns about the application under review and did not have to rely on information provided in previous, different proposals, especially one 15 years old.

Indeed, NEE argues that it had approval from the Army Corps of Engineers as if that were the end of the discussion. The Corps, however, approved NEE's application for the 279-unit proposal.[9] (NEE Br. at 30.) The permit stated: "If you change the plans or construction methods for work within our jurisdiction, please contact us immediately to discuss modification of this authorization. *This office must approve any changes before you undertake them.*" (NEE App. at A-31 (emphasis added)). Put simply, a 354-unit project necessarily constitutes a change of plans, and NEE failed to show that it had secured Corps approval for the proposed modification of the Corps authorization.

NEE then complains that the Town had the temerity to request information that NEE preferred to withhold "until the building permit stage," i.e., after NEE got its approval for the project. If the project was "fully engineered," NEE should have been able easily to provide the details when requested, not when NEE deemed it appropriate for tactical reasons to provide the information. The information requested was required under the Branford Zoning Regulations § 31.4.2.7, which NEE does not discuss. Litigants who fail to provide required information should not be heard to complain later about the result.

NEE asserts that "[t]he construction details that the Town staff asserted to be missing, such as permeability tests for the detention basins, are in the record." (NEE Br. at 30.) However, NEE provides no citation to the record. See *Barry v. Posi-Seal International, Inc.*, 40 Conn. App. 577, 581 n.4, cert. denied, 237 Conn. 917 (1996) (noting absence of cita-

[9]/ The number of units in the proposals has variously been 298, 268, 279, and 354.

tions to the record for claim that sufficient evidence existed to support finding).

NEE criticizes the Town for failing to provide NEE's "comprehensive" responses to the concerns expressed by the Town engineer and invites the Court to review some 20 pages of these responses in its appendix. (NEE Br. at 30). Only three of these pages (NEE App. at A-145, A-146, A-158) actually respond to the concerns cited in the Town's brief at pages 16-17, and the last "response" merely refers to earlier responses. The response at A-146 to the detailed questions on A-145 consists for the most part of generalizations, such as, "[W]e anticipate some tidal influences . . . ." The response acknowledges that one of the biofilter basins is indeed unconnected to the drainage system but chastises the reviewer for not seeing that the other basins are purportedly connected. Many of the other concerns expressed by the Town engineer are simply ignored.[10] The PZC was not required to accept these inadequate responses.

The Town was entitled to have reasonable questions answered. When the answers were not forthcoming, the PZC was entitled to act as it did.

6. *Site Restoration*

NEE insists that its representative "misspoke" (NEE Br. 31 n.19) when he asserted "Well, we'll [sic] probably going to bring in between three to four hundred thousand yards of material." (Reply App. RA37). The PZC was not required to believe his correction. NEE also claims that Penelope Sharp did not say that the site could not be restored. (NEE Br. at 31). She said the task was "daunting," and that, among other things, it was "difficult to imagine that a suitable growing medium will be provided in an area where the existing grade will actually be lowered." (PZC Ex. 34, Town's App. at A176, A177). Her testimony adequately supports the PZC's concerns as to site restoration.

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[10]/ Shirley Rasmussen noted:

> The applicant's report and plan slightly misrepresent the location of a portion of the coastal boundary which actually extends along the upland edge of the hundred-year floodplain, and not 1,000 feet from the edge of tidal wetlands as represented by the applicant. The result is there's just a finger of additional coastal boundary area, we think, depending on where exactly the tidal wetlands are on the site.

(PZC Tr. 10/2/03 at 81; Reply App. at RA111.)

7. *Wetlands Permit*

NEE claims that it did not need a new wetlands permit and could rely on the permit it obtained for the 268-unit project and that its plans had not changed. (NEE Br. at 31). The IWC ruled to the contrary. (Town's App. at A191). Given the substantial increase in the number of units on the project and other changes, the PZC could reasonably conclude that NEE's affordable-housing proposal was a change in plans that necessitated a new permit.

8. *Coastal Management Act*

Without explaining how it was prejudiced, NEE first complains that the Town did not brief the interplay between the Coastal Management Act and § 8-30g in the trial court. This is an important legal question of first impression. Further, the Town did brief the reasons related to the CMA in the trial court as a ground to uphold the PZC decision. (Town's trial brief dated 6/13/07 at 43-46, 55-56).

Next NEE complains that the PZC did not analyze the CAM review under § 8-30g. This argument is mistaken as the PZC addressed the coastal review in its decision to deny the affordable housing application. (Town's App. at A140-41). Because the reviewing court must ultimately decide whether the PZC's reasons pass muster, form need not be elevated over substance by requiring the commission to render a formulaic decision expressly stating that the reasons given outweigh the need for affordable housing. *Quarry Knoll,* 256 Conn. at 729-31. The PZC's findings are sufficiently clear for this Court's review.

On the merits, citing *Quarry Knoll,* NEE asserts that CAM reviews are subsumed into § 8-30g because this Court reconciled the environmental intervention statute, Conn. Gen. Stat. § 22a-19. (NEE Br. at 32). This aspect of *Quarry Knoll* concerns a commission's duty to consider reasonable alternatives before denying an application. *Quarry Knoll* says nothing about the substantive policies of the CMA and how to reconcile them with what may be the conflicting substantive policies of § 8-30g. Further, this Court limited its conclusion in *Quarry Knoll* to § 22a-19. *Id.* at 732 n.30.

NEE's reliance on *Fort Trumbull Conservancy, LLC v. Planning & Zoning Comm'n,*

266 Conn. 338 (2003), is similarly misplaced. *Fort Trumbull Conservancy* merely stands for the proposition that a coastal site review occurs procedurally as part of another zoning proceeding. It says nothing about the substantive standards of judicial review applicable to the commission's decision as to the coastal site review.

NEE ends its attack on the PZC's coastal review with several cursory statements that are irrelevant or wrong. (NEE Br. at 33). That coastal concerns were not cited in 1988 or 2002 is irrelevant to the coastal site review that actually occurred. The claim that the virtually strip-mined property has "few 'coastal resources' on the site" ignores the many concerns regarding the quality of the water and destruction of wildlife. That NEE's land was two-thirds of a mile inland does not mean that runoff and sedimentation from the project cannot affect the Sound; that the portion nearest the shore was the golf course does not alter this result. Finally, it is most certainly disputed that NEE's project would improve water quality, notwithstanding the testimony of NEE's expert to the contrary.

**C. No Probability of a Zone Change**

The Owners rely on irrelevant cases finding the highest and best use to be residential. (Owners' Br. at 11-12). In *Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 64 n.10 (2007), the property at issue was zoned for residential zone use. In *French v. Clinton*, 215 Conn. 197, 199 (1990), a marina was a permitted use under the zoning regulations. Neither case required a zoning change. Nor was there a history of denial of applications.[11]

The Owners claim that the SDA is evidence that residential use would be permitted. The Town has already explained why this is not so. (Reply Br. at 9). Further, the PZC denied the market-rate project in 2002 and affordable housing project in 2003. Given those denials, it is speculative to suggest that the property could be developed for residential use.

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[11]/ *Norwich v. Styx Investors in Norwich, LLC*, 92 Conn. App. 801 (2006), did not involve zoning at all but turned on the doctrine of assemblage and whether the condemnee was required to assembly the property.

The Owners do concede, as they must, that the lack of a necessary permit can limit the value of condemned land. See *Russo v. East Hartford*, 179 Conn. 250, 256 (1979) (affirming conclusion that plaintiff failed to prove that necessary environmental permits would have been granted).

Similarly, while a project was approved in 1988, it is speculation to conclude that the PZC would again approve such a project when it had denied such applications more recently.

The Owners also rely on the 1997 Future Land Use Map to insist that residential use was permitted. The court, however, found that the land was zoned IG-2. To the extent that the map is inconsistent with the zoning regulations, § 22.2 of the regulations provides that when determining the boundaries of various zones, the PZC must consider, inter alia, "the expressed intent and purposes of these Regulations." The IG-2 regulations express the intent to prohibit further residential development. To the extent the 1997 map is inconsistent with the regulations, the elimination of the PDD in 2002 reinforces the intent not to relax the restrictions against future residential development and operated as a repeal of the map as to the property.

The Owners finally claim that the Town's appraiser conceded that industrial is not the best use of the land. It does not follow, however, that residential is the best use.

**D. The Trial Court *Did* Award Lost Profits.**

With an eye on the Town's appeal in S.C. 18132, NEE quibbles with the Town's reading of *Laurel, Inc. v. Commissioner of Transportation*, 180 Conn. 11 (1980), concerning the inclusion of lost profits in valuing the property. In *Laurel* this Court framed the issue as "the trial court's inclusion of $1,051,900 in lost profits in its award to Laurel." *Id.* at 36. By acknowledging that the plaintiff in *Laurel* was awarded "the present value of the revenue that would have been achieved by building and selling condominiums" (NEE Br. at 21), NEE essentially concedes that that award would include lost profits. *Laurel* indeed awarded lost profits in valuing the land. In affirming the lower court, this Court stated in *Laurel* that "the referee's inclusion of an element of lost profits on the aborted project as an element of value which Laurel created by enhancements to the land in the award of compensation" was not error. *Id.* at 43.

In citing favorably the testimony of the appraisers for NEE and the Owners (R. 85), the court here was likewise including lost profits in its award because their testimony of

comparables, as discussed in the memorandum of decision, compared prices of land per unit of the housing development as well as per acre. (R. 72-80). Since this case involves unit prices for raw land, both appraisers were necessarily taking lost profits into account in their valuation, and the court was necessarily awarding lost profits in its valuation.[12]

## III. NEE AND THE OWNERS HAVE WAIVED THEIR RIGHT TO CLAIM THAT THEY WOULD HAVE PREVAILED ON A § 8-30g APPEAL.

NEE and the Owners could have appealed following the PZC's denial of their application under § 8-30g. A party may not bypass an administrative appeal provided by statute and bring an independent action to test the issue the appeal was designed to test. *Wendels v. Environmental Protection Comm'n*, 284 Conn. 268, 300 (2007).

Despite their protestations to the contrary, NEE and the Owners had two bases for standing in their § 8-30g appeal. First, § 8-30g provides standing to disappointed applicants: "Any person whose affordable housing application is denied . . . may appeal such decision . . . ." NEE is a "person whose affordable housing application [was] denied" and thus had statutory aggrievement.

Second, NEE and the Owners could have pursued a § 8-30g appeal after condemnation because they were also claiming at the same time in a separate action – now S.C. 18132 – that the taking was wrongful. If they proved that the Town's exercise of eminent domain was improper, they could have received mandatory injunctive relief restoring the property to them. *Pequonnock Yacht Club, Inc. v. Bridgeport*, 259 Conn. 592, 606 (2002).[13] They thus retained an interest in having the property approved for residential use.

*Pequonnock*, which affirmed a trial court decision granting mandatory injunctive re-

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[12]/ In any event, NEE and the Owners were entitled under *Laurel* to claim lost profits whatever the trial court awarded.

[13]/ NEE argues that the Town took the position in the 2003 temporary injunction hearing that NEE had an adequate remedy at law. In the first place, a party cannot concede the law. *New Haven Savings Bank v. LaPlace*, 66 Conn. App. 1, 14, *cert. denied*, 258 Conn. 942 (2001). In the second place, a temporary injunction proceeding is not binding on later proceedings. *Massachusetts Mutual Life Ins. Co. v. Blumenthal*, 281 Conn. 805, 811 (2007). NEE itself benefits from this rule because one of Judge DeMayo's grounds for denying temporary injunctive relief was that NEE's case is without merit. (R. 169-75).

lief restoring condemned property to a former owner, holds that where a condemnation is improper, the taken property can be returned to the person from whom it was taken. NEE's out-of-state cases do not establish, as NEE implies, a "majority common law rule" opposed to *Pequonnock*. They simply provide that, once a taking for a proper public use has occurred validly, the original owner no longer has any interest in the property and cannot seek that it be returned even if the condemnor later changes its mind and puts the property to another use. These cases simply do not address the situation where a property owner claims, as here and in *Pequonnock*, that the taking itself is improper. Plaintiffs cite no case – from Connecticut or elsewhere – calling *Pequonnock* into question.

As for public policy, the *Pequonnock* rule makes common sense. A temporary injunction is generally not appealable. *See Massachusetts Mutual*, 281 Conn. at 811. At least where the property has not been radically altered – as where a dock is destroyed to clear the way for dredging[14] – the owner has a right to pursue mandatory injunctive relief soon after the condemnation, and a final decision affords the parties full appellate review.

NEE also argues that the yacht club in *Pequonnock* was in a different position because it was a fee owner rather than an optionee but provides no explanation of why this distinction matters. (This point of course does not help Santa Barbara and Perrotti.) NEE claims to have had a property interest that was condemned. If it did, the property interest could have been returned under *Pequonnock*.

Having withdrawn its § 8-30g appeal and its permanent injunction claims, NEE waived its right to claim that it probably would have won a § 8-30g appeal.

## IV. THE IMPROPER LEGAL OPINION OF NEE'S EXPERT THAT THE § 8-30g DENIAL WAS REVERSIBLE ERROR SHOULD HAVE BEEN EXCLUDED.

The issue is whether a witness is permitted to testify on whether a court of law would have reversed a particular decision of a zoning commission. This issue is a question of law

[14]/ Following the taking, the land at issue here remained vacant and undeveloped, as it had been before the taking. (R. 63-65; Owners' App. A2). Neither the Owners nor NEE itself has ever claimed that the property was altered in a manner to make its return impossible.

and so this Court's review is plenary. *Rhode v. Milla*, 287 Conn. 731, 737 (2008). The Town's principal position is that the trial court had to decide as a matter of law whether the appellees would have prevailed on a § 8-30g appeal, thus making factual testimony irrelevant. But even if such testimony is relevant, it clearly is improper, because a witness is incompetent to offer a legal opinion except on an issue of foreign law. *Webster Bank v. Oakley*, 265 Conn. 539, 551 n.10 (2003). While the appellees attempt to muddy the issue, it is clear from his testimony quoted above (Reply Br. at 3-4) that he indeed gave the court a legal opinion in violation of *Oakley*.

Branse's testimony is of no consequence if the Town is correct that this Court's review of the trial court's § 8-30g decision is plenary. But if this Court defers in any respect to the trial court, then Branse's testimony, the only testimony that a § 8-30g appeal would have succeeded, clearly affected the trial court's highest and best use determination.

**CONCLUSION**

The judgment should be reversed and a new trial should be ordered on the value of the property at the time of the taking based on the zoning at the time of the taking.

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